In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 438

UNITED STATES OF AMERICA, APPELLANT

v.

THE SINGER MANUFACTURING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

Appellee's principal argument in the Motion to Affirm (p. 3) is that the questions presented in the Jurisdictional Statement "are predicated upon facts squarely in conflict with the trial court's findings of fact and present for review substantially all of the trial court's findings and all of the underlying facts upon which they were based." This contention is erroneous and evinces a misunderstanding of the government's position. Therefore, we believe a brief response is warranted.

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1. The government's contention that Singer combined or conspired with Gegauf to restrain trade in multi-cam sewing machines in the United States and unilaterally attempted to monopolize that market draws its main strength from the undisputed fact that Singer entered into the agreement to acquire patents under which it already had a license for the express purpose, which it communicated to Gegauf, of excluding from the United States market its primary competitors, manufacturers and distributors of Japanese-made machines (*e.g.*, J. St., pp. 15, 16, 18–21). We maintain that this fact—which the district court reiterated throughout the opinion (*e.g.*, J. St. App., pp. 42a–44a, 53a, 73a–74a, 80a)—together with the court's further finding that Gegauf entered into the acquisition agreement for the identical purpose of facilitating the exclusion of the competing Japanese machines from the United States market and thus strengthen its position *vis-a-vis* the Japanese in Europe (*e.g.*, J. St. App., pp. 43a, 47a, 53a), makes out a combination or conspiracy between such competitors to restrain and monopolize trade in violation of Sections 1 and 2 of the Sherman Act. The existence of the combination or conspiracy and its illegality, we submit, follow as a necessary conclusion of law from the facts as found. The same facts, considered in the context of Singer's already dominant economic power in the United States multi-cam market, where it is the sole domestic producer and major domestic seller of such machines and has its own patents covering multi-cam mechanisms (J. St. App., pp. 9a–13a, 17a, 21a; J. St., p. 15), establish a

forbidden attempt to monopolize (see J. St., pp. 9–10, 21; Motion, pp. 23–24), again as a matter of law.[1]

There is no merit, therefore, to appellee's contention that the government is primarily seeking a review of the district court's factual findings. Moreover, the additional facts upon which Singer bases its Motion to Affirm in no way affect our legal argument on the above questions.

(a) Singer alleges that it intended to grant licenses under Gegauf I "if desirable" (Motion, p. 12). This allegation runs counter to the district court's specific finding that "Singer did not intend to license others under its [Gegauf's] patent" (J. St. App., p. 78a; see Motion, p. 11 for Singer's explanation of this finding). In any event, a pooling of patents to restrict competition cannot be validated by the mere possibility that the patentees might, at some time, find it expedient to grant licenses to others. Rather, the critical fact is whether competitors could obtain licenses on reasonable terms if and when they so desired. In upholding the patent pool challenged in *Standard Oil Co.* v. *United States*, 283 U.S. 163, this Court emphasized that the agreements there in question did not restrict the granting of licenses to non-participants in the pool (*id.* at 170, 176 and fn. 12), and that the "available advantages [were] open *on reasonable terms to all manufacturers desiring to participate*" (*id.* at 171, emphasis added). And in *United States* v. *Krasnov*, 143 F. Supp. 184 (E. D. Pa.), affirmed *per*

[1] On the attempt to monopolize issue we rely also on the district court's finding that Singer had a specific intent to bar *all* infringing machines from the United States market (*e.g.*, J. St. App., p. 74a).

curiam, 355 U.S. 5, the district court noted that one of the reasons for its holding that a patent cross-licensing agreement violated the Sherman Act was that defendants refused to grant "rights under the * * * patents to any third parties until they found it necessary to do so" (143 F. Supp. at 199).

(b) Singer suggests that in practical effect there is no combination of patents involved here because, during the period from 1957 to 1959, enforcement of Gegauf I and Gegauf II alone would have resulted in the exclusion of almost the same number of machines as could have been excluded by the Gegauf patents plus Singer's other three patents (Harris reissue and the patents covering the "401" and "319" machines) (Motion, pp. 9–11). For example, it asserts that in 1959 the three Singer patents could have excluded only an additional 800 machines, totaling .0031 of the domestic multi-cam market (Motion, p. 10).

The important point, however, is that these patents do cover multi-cam machines that could be utilized by competing manufacturers as commercially practicable alternatives to those barred from the American market by the Gegauf patents. If it were not for Singer's ownership of the patents covering these alternative devices, and its intention to enforce them, the 800 imported machines not excluded by the Gegauf patents in 1959 might well have multiplied many times over in subsequent years. Thus, the exclusionary power of these patents effectively supplements the exclusionary power of the Gegauf patents and enhances Singer's dominance in the industry.

(c) Singer also urges that there can be no question here of a conspiracy or combination to exclude from the American market any competing machines other than those of Japanese manufacture (Motion, pp. 13–14). This limitation of the scope of the alleged conspiracy cannot benefit appellee, however, since a conspiracy to exclude competitors from a substantial market is no less illegal merely because it is directed toward fewer than all of one's competitors. *E.g., Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207.

The district court expressly found that Singer sought to exclude from the United States market all infringing machines, not merely machines of Japanese manufacture (J. St. App., pp. 48a, 74a). Moreover, the court's findings, we believe, support the conclusion that Gegauf was advised of this purpose and embraced it (albeit attempting to persuade Singer to refrain from enforcing the patents unilaterally against certain specified European manufacturers) (see J. St. App., pp. 46a–48a, 53a). However, appellee is correct in pointing out that in the district court the government's charge of a combination in restraint of trade—in contrast to its attempt-to-monopolize charge—was, at the time, confined to machines of Japanese manufacture (see Motion App. B, pp. 19a–23a). Accordingly, we concede that the words "and other imported" should be deleted from line 4 of the first question presented in the Jurisdictional Statement (p. 2).

2. The third issue presented in the Jurisdictional Statement is whether the agreement between Singer

and Gegauf that each would (a) refrain from taking any action "in any country" which might restrict the scope of the other's patent claims and (b) undertake to facilitate the granting "in any country" of claims of the broadest possible scope, is illegal under Section 1 of the Sherman Act.[2] The importance of this question is underscored by the enactment on October 15, 1962, subsequent to the filing of the Jurisdictional Statement, of Public Law 87-831 (76 Stat. 958) which requires that settlements in patent interferences be filed with the Patent Office. The announced purpose of this statute is to "make it more difficult for patent applicants and owners to use an interference settlement agreement as a means of secretly violating the antitrust laws." H. Rep. No. 1983, 87th Cong., 2d Sess., p. 1. The House committee which reported out the bill observed (*ibid.*) that "[r]ecent experience

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[2] The government maintains, and it so argued at the trial, that both aspects of the agreement, letters (a) and (b) above, which are complementary parts of the portion of the agreement numbered "1," are illegal (J. St., p. 22). There is no merit to appellee's suggestion (Motion, p. 32) that the government waived at trial its contention that the second part of the agreement, (b) above, is illegal. In "Plaintiff's Trial Brief" the government expressly attacked both parts of the agreement (Tr. 3367) and in "Plaintiff's Post Trial Brief," although stating that (a) above was "[t]he provision which is unlawful" (Tr. 6423), the government argued at length that the basic vice of the agreement was that it fostered "the allowance of broad claims," the wording of (b) above (Tr. 6424; see Tr. 6426, 6427, 6428, 6431, 6432, 6434). The district court discussed and ruled upon the legality of both parts of the agreement (J. St. App., pp. 36a–37a) and at the outset of its opinion framed the issue in the language of (b) above (J. St. App., p. 2a). See also appellee's arguments to the court below, Tr. 6025, 6026, 6491.

has indicated that parties have sometimes used these interference proceedings in derogation of the public interest, in that interference settlement agreements have been entered into for the purpose of restricting competition." The report quoted a letter from the Department of Justice to Congressman Celler which was expressly "made a part of this report," and which stated among other things (*id.* at 4, *emphasis added*): "Interference settlement agreements have been entered into *for the purpose of obtaining patents as broad as possible in order that they may be used by the parties to eliminate competition.*"[3]

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[3] In our Jurisdictional Statement we attack as clearly erroneous the district court's finding that the phrase "in any country," as used in (a) above, refers only to certain foreign countries and not to the United States (see J. St., p. 24, fn. 20).

Singer's sole asserted justification for the court's interpretation is that the agreement not to restrict the scope of each other's claims, (a) above, was intended to apply only in countries having "invalidation, opposition and nullity proceedings *in which one may restrict the scope of claims of others*," while the agreement to facilitate the granting of claims of the broadest possible scope, (b) above, was intended to apply only in countries (such as the United States) having interference proceedings (Motion, p. 35, emphasis added). The short answer is that a party to an interference proceeding in the United States Patent Office can succeed in restricting the overall scope of the claims made in his adversary's patent application by proving that the broadest interfering claims in that application are unpatentable. See Patent Office Rules 232 and 233, 37 C.F.R. 1.232, 1.233. Moreover, in two other licensing agreements, Singer demonstrated that when it wished to frame an agreement dealing only with resort to invalidation, opposition, or nullity proceedings (as opposed to an agreement, such as the one here, not to restrict the scope of one another's claims, in any type of proceeding) it knew how to do so in explicit language (see Dx. 133, reprinted in Motion, App. E, p. 37a).

CONCLUSION

This case is of considerable economic importance (see J. St., pp. 14–15; Motion, p. 26, fn. 6), and the appeal presents three substantial legal issues of broad public importance. Probable jurisdiction should therefore be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LEE LOEVINGER,
Assistant Attorney General.

ROBERT B. HUMMEL,
GEORGE R. KUCIK,
LES J. WEINSTEIN,
Attorneys.

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